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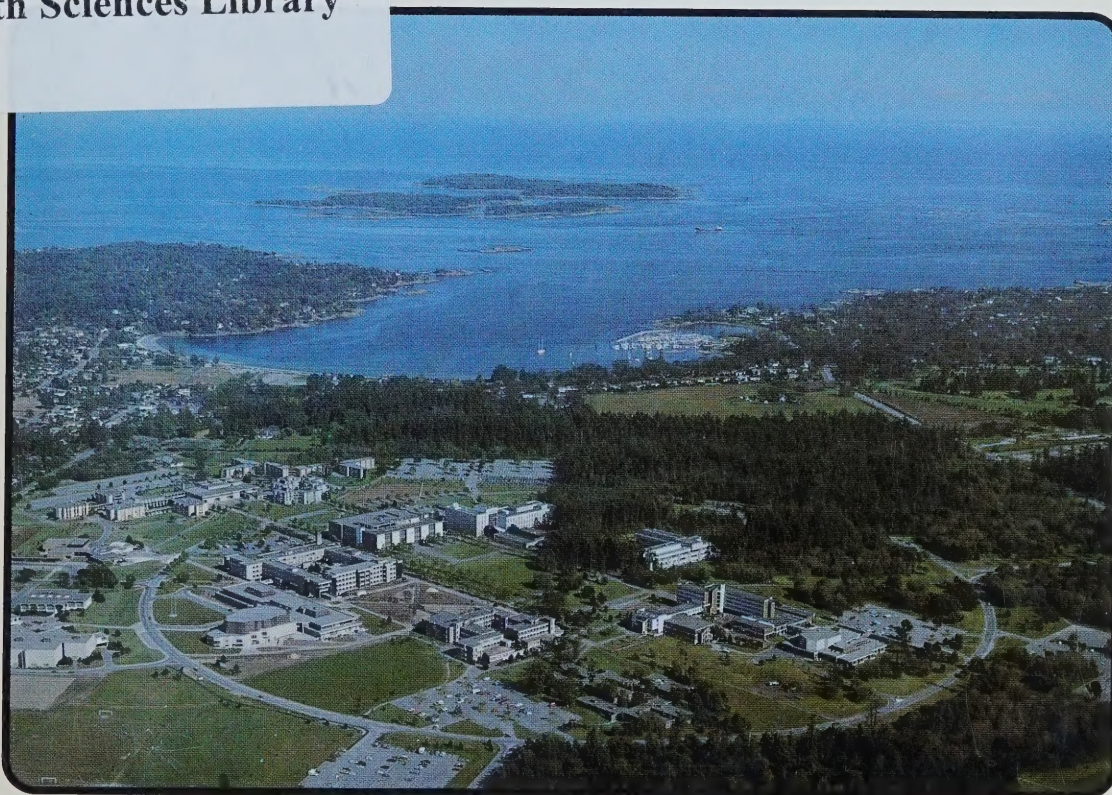
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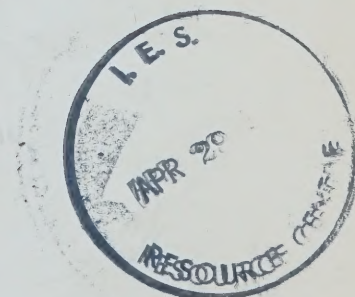
CITIZEN PARTICIPATION AND PUBLIC HEARINGS: EVALUATING NORTHERN EXPERIENCES

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University of Victoria





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Foreword

FOREWORD

During the past two decades, increased public concern over the planning and management of natural resources has created a demand for greater public involvement in the decision-making process. In northern Canada, projects relating to the exploration and exploitation of hydrocarbons have aroused public interest, especially among local communities. In response to this interest, the federal government has provided mechanisms to elicit public opinion, commonly in the form of public hearings.

This paper suggests that the public hearing can be an effective mechanism for gathering public input as long as a number of criteria are met. These criteria include the right of interested persons to participate in the hearing before any major decision is made regarding the project proposal, the right to be heard by an unbiased and disinterested person or panel, adequate notice of the hearing and its procedures, access to information regarding the proposal and provision of funding to qualified individuals or groups according to some pre-determined criteria.

A survey of the legislation pertaining to the transportation of northern natural gas suggests that the present legislation does not contain provisions to meet these criteria; therefore, the quality of input is largely dependent on the favourable exercise of discretion by government agencies and officials. In addition, the authority to hold hearings under each piece of legislation contains a great deal of jurisdictional overlap. Hearings held under different statutes have been costly in terms of duplication of effort by all concerned — government, industry and public intervenors. Greater consistency in establishing hearing mandates and procedures could reduce costs to all participants.

To ensure the effectiveness of public hearings, participants should be assured that the necessary criteria are met and that needless duplication of effort is eliminated. Experience in the North suggests that the hearing procedure is still evolving and, as a result of public pressure, government is making positive, though cautious, changes to improve its effectiveness.

Chapter 1

PUBLIC PARTICIPATION AS AN EMERGING ISSUE

1 PUBLIC PARTICIPATION AS AN EMERGING ISSUE

A. THE POSITIVE VALUE OF PUBLIC PARTICIPATION

The advent of the environmental movement during the 1960's was accompanied by greater public awareness of the human issues which arise from the allocation and management of natural resources. This awareness became evident in a growing dissatisfaction with traditional methods of resolving resource use conflicts, a questioning of the legitimacy of the role of government decision-makers and a greater demand for information about, and involvement in the decision-making process (Anderson, 1971; Emond, 1978; Franson and Burns, 1974; Sewell, 1975; Lucas, 1976; Schatzow, 1976).

Traditionally, proponents of resource development have been closely associated with regulatory agencies and their review processes to the exclusion of opponents (Lucas, 1971; Sewell, 1976; Wigmore, 1980). This practice has come into question for at least two reasons. First, resource developers have not traditionally considered the broader social, environmental and institutional issues which surround their project proposals because these issues do not generally accrue directly to the cost of a development scheme. The non-economic effects are often difficult to conceptualize until final commitment is made to a proposal. There is an increasing recognition, however, that these concerns are as important to an analysis of a proposal as are issues of initial capital financing. This realization is capsulized by Conway who states "energy planning is not a technical and economic exercise. It is the kind of exercise in which you set social goals, not energy goals . . . society and social preferences have to come first" (Conway, 1977, p. 51).

It has also been observed that agencies which regulate resource developers are not likely to raise broader social issues associated with development projects. Government bureaucracies tend to become narrow and partisan in the discharge of their responsibilities, and to lose sight of broader public goals and aspirations (Morley, 1976). As a result of prolonged contact with industry through the regulatory process, government agencies tend to adopt the values and biases of the industry they seek to regulate (Lucas, 1971). As a result, these agencies become captives of industry and may not enforce their legislation as strongly as they first intended. Consequently, the agencies themselves require supervision and cannot be expected to regulate their own activities.

These practices have given rise to a greater demand for public intervention into the traditional activities of government agencies and departments.

The demand for more direct public involvement in decision-making has both ethical and practical elements. Members of a democratic society generally assume that they have a right to be informed and consulted on matters that affect them personally (Sewell and O'Riordan, 1976). The democratic system permits public input through the election of public representatives, who in turn speak on behalf of their constituents. Some segments of the public do not consider the electoral system a fine enough device to check the actions of elected members and are not prepared to allow a government to carry out its full term without further meaningful public consultation (Anderson, 1971; Emond, 1975; Wigmore, 1980). Direct methods such as planned protests and letters to officials and newspapers have been used to voice concern over public issues. These traditional methods are not always adequate, however, because they do not provide for continuous, influential involvement.

Dissatisfaction with these traditional forms of participation arises because significant sectors of the public perceive that government has failed to respond appropriately to the needs and demands of its citizens. When decisions are made regarding individual lifestyles and aspirations without consulting those affected, members of the public feel increasingly apprehensive of, and alienated from, government decision-making. As a result, certain members acquire a profound distrust of the political system and generate a demand for a greater public role in these decisions (Riedel, 1972; Sewell and O'Riordan, 1976).

Sometimes policies either fail to bring about intended benefits or they incur economic, social or environmental costs which are not acceptable to the public. If government fails to correctly determine public desires in these matters, it may be responsible for costly errors of judgment. Such was the case during the early 1970s when the Federal Government created a new townsite for an Indian community living in Rae, approximately forty kilometres west of Yellowknife, in the Northwest Territories. Rae originated in a location ideal for hunting, fishing and water transport to nearby communities. As the population grew, a trading post was established, soon followed by a mission, schools and other services. Today Rae is the largest Indian community in the Northwest Territories, with a population of 1,300.

Since the Second World War, increasing population and infrastructure created problems associated with a poor water supply and drainage and sanitation system. The problems reached a peak politically during the 1960's when a number of children died. Government officials and appointed experts decided that to solve the difficulties, the community should be moved to a nearby

location. A new site was chosen, and given the name Edzo, after a prominent local Indian chief.

Public meetings were held by the Federal Government to encourage the residents to adopt this new plan. The Indians, however, did not wish to move from their townsite; they expressed a need to stay near their fishing nets and voiced resentment of government interference. After many meetings, however, the chief conceded to the government proposal, although he claimed that the residents would not move.

The government proceeded to create the new town of Edzo with new roads, houses, water and sewer mains, a nursing station, a fire hall and a sewer lagoon. Today, this town remains underpopulated as most of the people from Rae refused to move as predicted. The government has been forced to solve the health problems at Rae within the community itself. Had the government interpreted correctly the issues raised by the Indians, it could have avoided spending the time and money on the new town of Edzo, and rather have spent its investment more wisely on providing an internal, mutually acceptable solution for Rae (Gamble, 1982).

Some projects which have been reviewed and approved by government without significant public input have, upon implementation, generated strong opposition which has resulted in their cancellation. One example is the construction of the Spadina Expressway in Toronto which was halted after \$64 million had already been invested (Sewell and O'Riordan, 1976). These costs could have been avoided, and a more acceptable decision could have been realized if the public had been consulted prior to project approval (Riedel, 1972; Sewell, 1971).

As the demand for public participation has become a growing issue in government decision-making, numerous definitions have been suggested to describe the role of public participation in the political system. These definitions incorporate the notions that participation allows non-elected members of the community to become involved in the decision-making process beyond the influence which is exercised during elections (Kure, 1977; Tyler, 1977). They emphasize that the process should make the citizens aware of impending programmes and allow the public to play an influential role in evaluating the economic, technical and administrative consequences of the measures under consideration (Kure, 1977).

The positive value of extending public involvement in environmental decision-making has been recognized for a number of reasons. Firstly, it is considered that affected individuals are usually underrepresented in the decision-making process. Provisions for participation allow interested citizens to present their views and provide useful information pertaining to the programme

under consideration (Environment Canada, 1972). Secondly, public involvement provides a useful mechanism for information exchange. Professionals are usually called upon to evaluate technical aspects of project or programme proposals and can serve to explain these aspects to the public. Alternatively, members of the public provide decision-makers with general insights into public values and attitudes (Swanson, 1971) as well as more specific information regarding the social, cultural, economic and health implications of a project (Emond, 1978; Nelson, 1977; Searle, 1977). When the public perceives that decisions have been made with consideration of all issues, public confidence in the decision-making procedure is enhanced. The decisions which result may meet with less public opposition because citizens do not feel threatened by change. Because of decreased opposition, the cost of the implementation procedure may decline as expensive reversals of decisions, such as in Toronto, are avoided (Elder, 1975; Franson, 1974).

B. CRITICISMS OF PUBLIC PARTICIPATION

Criticism of greater public participation rises largely from traditional decision-makers. Some politicians and government bureaucrats believe that members of the public can hold a disproportionate influence in the process at the expense of those who have traditionally made decisions. These critics are uncertain that an increase in public involvement will necessarily lead to decisions in the broad public interest (Emond, 1975; Sewell, 1977).

Part of the difficulty with involving the public in decision-making is that those who participate do not necessarily represent the public interest at large (O'Riordan, 1976). There is no efficient means of assessing the intensity of public preferences or determining the public will based on those citizens who take part in the process. Participatory structures tend to favour those who are articulate, well-educated, financially secure and politically aware. Those who lack these qualities generally cannot or do not choose to become involved in the decision-making process. As programmes for public involvement are developed which require greater dedication of time and effort, usually the participants must use more sophisticated techniques (Burch, 1976; Emond, 1978; O'Riordan, 1976). As sophistication becomes greater, the opportunity for broad participation becomes less. Critics of participation sometimes state that select participation which results is a poor representation of the public view at large.

Opponents may also view an involvement programme as reducing the efficiency of decision-making. They believe that environmental or resource

decisions involve complex technical issues which are beyond the scope of the public to understand (Priddle, 1977; Wilkinson, 1976). According to these critics, participation on these issues results in needless expense. As more people become involved in the decision-making process, costs continue to rise. When the value of public input is considered negligible at the outset, the additional costs to provide personnel to facilitate the process and the costs which ensue from delays in decisions are perceived negatively (Emond, 1975; Sewell, 1977).

C. OUTLINE OF THE PAPER

Notwithstanding these criticisms, pressures have increased to expand opportunities for citizen involvement at all levels of government in a variety of social issues. Greater demand for participation in natural resource decision-making at the federal level is no exception. As a result of these pressures, the Canadian Government introduced new legislation and made amendments to facilitate public participation programmes (Emond, 1978; Sewell, 1975; Vindasius, 1974). During 1970 and 1971 a number of statutes were introduced which contained provisions for participation, most commonly through public hearings (for example, Amendments to the Territorial Lands Act, 1971; Northern Inland Waters Act, 1971).

Since the enactment of the new legislation, northern Canada has become a focal point for resource exploitation and consequent assessment of development proposals. Since 1975, at least fifteen major hearings have been held in the Yukon and Northwest Territories as well as a number of minor ones.

This paper examines the legislative provisions for public hearings in the Yukon and Northwest Territories to determine their value in providing an effective mechanism for public participation. The focus is on the provisions that pertain to natural gas transportation projects either by pipeline or by tanker.

Analysis is divided into two parts. The first part examines the hearing process in general, placing it into context with other forms of participation and discussing its overall merits and shortcomings. This discussion establishes criteria which are necessary to provide a full and fair hearing and against which the legislative provisions will be assessed. The second part surveys the legislation for public hearings in northern transportation projects and analyzes their effectiveness by two sets of measures. The first set assesses the degree to which the provisions meet the six criteria, while the second measurement determines the efficiency with which the relevant agencies define their jurisdiction and provide distinct hearing mandates.

Chapter 2

ALTERNATIVE MECHANISMS

2 ALTERNATIVE MECHANISMS

A. GOVERNMENT RESPONSES

The public hearing remains the most popular technique to elicit divergent opinion on public issues. The Federal Government has worked to expand its use and to introduce new techniques to facilitate greater public involvement. Public inquiries have only recently been instituted to gather public opinion on resource development issues, the most widely acclaimed being the Mackenzie Valley Pipeline Inquiry. Other inquiries into resource issues include the West Coast Oil Port Inquiry, the Alaska Highway Pipeline Inquiry, the Hartt Commission on Northern Environment in Ontario and the Pearce Commission on Pacific Fisheries Policy. The proliferation of Commissions of Inquiry in recent years suggests that this mechanism has become a popular method for government to solicit public opinion in resource management issues.

Less formal opportunities have also emerged including the use of workshops, public meetings and task forces. The Environmental Assessment and Review Process (EARP) has recently incorporated workshops and meetings into its assessment procedure in addition to public hearings (Rees, 1980). A review of some of these mechanisms may provide an understanding of mechanisms which can be used as alternatives or complements to the hearing process.

Of the mechanisms available to involve the public in the planning and policy-making process, Sewell (1975) identified twelve major types of participation. These range from intermittent procedures such as opinion surveys and voting procedures, through adversarial approaches including direct action by pressure groups and court actions, to co-operative methods using workshops or task forces. Each method has its merits and pitfalls, yet it is difficult to determine what method is most effective for at least three reasons:

1. Effectiveness is difficult to define. To some it means the efficiency of a participation programme, to others it means ensuring that all members of the public have the statutory right to provide input.
2. Experience in different methods differs enormously; some methods are still in the experimental stage while others are well-established and accepted. Many mechanisms may

have potential as a participatory tool, yet, because of their newness, their application thus far may not have been successful (Smith, 1982).

3. It is still not clear at what point involvement is most effective. The effectiveness of a method may depend on the point in the planning process at which it is undertaken (Sewell, 1975, p. 10).

Five mechanisms have been selected for review as they are viable alternatives or complements to the public hearing. These are reviewed separately to provide an indication of their individual advantages and shortcomings. They alternatives are court actions, public meetings, workshops and seminars, task forces and green papers.

B. COURT ACTION

Court action can be used for environmental issues to generate political pressure for changes to help solve environmental issues (Lucas, 1976). Through legal action, members of the public use the courtroom as a forum to raise substantive issues through direct evidence, cross-examination and argument even though such an opportunity may have been denied by the agency during its decision process. In this way, individuals and interest groups can gain leverage to force administrators and politicians to make legislative or policy changes on matters affecting the natural and human environment.

Constitutional and legislative problems arise, however, when courts are used as vehicles to raise environmental issues. Theoretically, formal initiatives for direct public participation are based on constitutional or statutory authority vested in political or administrative bodies (Lucas, 1977). While agency mandates are usually broad enough to include participatory activities, administrators have discretionary powers to exclude members of the public from the decision-making process. These powers are normally considered beyond judicial review (Franson, 1974; Lucas, 1977).

Practical problems also hinder the effectiveness of legal action as a participatory mechanism. According to common law, a citizen may be given rights to participate in a judicial review only if he can prove that he has suffered special or peculiar damage to his person or his property beyond that suffered in common with the rest of the public (Lucas, 1976). Since environmental injuries usually affect large numbers of people equally, it is very difficult to find someone who fulfills this requirement (Franson, 1974).

Members of the public may also be hindered from effective participation because they cannot gain access to the information necessary to prepare adequate testimony. Access to information is vital to properly prepare and ensure the viability of legal action. Yet much of the necessary information may be withheld by government agencies because it is deemed confidential. The new *Access of Information Act* could provide the means of making information available. However, it has many shortcomings which are discussed further in Chapter 5.

The high cost of legal proceedings may also restrict potential participants. Expenditures must include the costs of running scientific tests, obtaining testimony of expert witnesses and hiring a lawyer (Fraser and Anthony, 1972, p. 98). In addition, if an individual or an environmental group were to lose a proceeding, they could expect to pay not only their own legal costs, but those of their adversaries as well (Fraser and Anthony, 1972; Lucas, 1976). These expenses may be prohibitive to prospective participants.

It is not likely that Canadian courts in themselves will provide an appropriate forum for public participation in administrative decisions. Firstly, the Canadian legal system does not guarantee a citizen the right to participate in public and private decisions regarding environmental management. Secondly, procedural practices may make costly demands on public interest groups which are difficult, if not impossible, for them to meet. Finally, court review of decisions by environmental agencies are generally confined to procedural and jurisdictional issues. Judgments usually try to reflect the intent of the law rather than the values which society may hold (Sewell, 1975). For these reasons, the courts have not been used extensively in Canada as vehicles of social change. Their use, although limited, may be appropriate in certain circumstances to exert pressure on responsible politicians (Lucas, 1977).

C. PUBLIC MEETINGS

A more flexible, less costly method of encouraging citizen participation is through public meetings. Meetings can be a useful means of exchanging information between citizens and administrators. If a number of meetings are to be held in succession, they must have a sharply defined, debatable issue as a focus for discussion so that interest and commitment are sustained. Meetings are most constructive if the meeting group remains relatively small (Sewell, 1975).

One danger in using public meetings is that they can become a forum of confrontation between opposed interest groups, and thereby hinder their

co-operative objective. At worst, administrators can use opposing interest groups to their advantage by playing off the interests of one group against those of another. More likely, public meetings can be used as public relations vehicles for decision-makers to "sell" the public on the proposed policy or programme (Priddle, 1977).

Public meetings are usually more successful if they are held in conjunction with other participatory techniques. One example is the community information meetings which were held prior to the Mackenzie Valley Pipeline Inquiry. These meetings served to educate the local people on all aspects of the proposed pipeline and the nature of the Inquiry. The result of the meetings was an informed public which was better prepared to present quality testimony to the Inquiry than would have been the case without any pre-Inquiry meetings (Waddell, 1981).

D. WORKSHOPS AND SEMINARS

Workshops and seminars are flexible participatory techniques which also serve interactive and educational functions. Either the public at large or select individuals may be chosen to participate in workshops with government personnel on an informal basis to discuss issues of mutual concern. Workshops can focus on a specific problem such as a particular development proposal, or a selection of related problems such as management strategies for a certain resource. They may be held at specific points in the planning process or continuously throughout. In general, the characteristics of participants, the informal atmosphere and the flexibility of the technique contribute to the generation of high quality ideas. The selection of participants is critical for constructive idea formulation as a poor sample of participants may not lead to broad-ranging, innovative opinions. In addition, the actual usefulness of workshops may be limited if the participants have no authority to practice the ideas which have been formulated.

E. TASK FORCES

Similar to workshops and seminars, task forces also bring together a variety of participants in an informal atmosphere to discuss aspects of policy or resource management strategies. This method is flexible in terms of the number and background of participants as well as the stage in the planning process where it is used. To be most constructive, members of a task force must have a

large degree of independence from the agency to which they report. They must be able to hire independent research staff, set their own agenda and publish all their findings and recommendations (Shatzow, 1977).

Task forces require a lot of time and dedication from those who participate so only those who are able to commit their time and continued interest can take part. The members of a task force may also have vested interests in the outcome of the undertaking and, therefore, the members may not represent all possible interests.

F. GREEN PAPERS

Finally, Green Papers are a mechanism which may allow public input well before final planning decisions are made. One recent example is the 1980 Draft Green Paper on Lancaster Sound Region, 1980-2000. Green papers are proposed policy papers which are published at an early stage in the planning process to promote public reaction, discussion and feedback prior to policy formation (Shatzow, 1977). They arise from departmental review of an issue and attempt to provide background information on a specific policy question and a range of possible solutions. Because they allow for dissemination of information and feedback, Green Papers can serve a valuable educational function for both the public and the decision-maker.

Green Papers can only serve this function if they incorporate a feedback mechanism which encourages widespread public input. Without a relatively simple accessible method of feedback, participation is likely to be limited to a few, highly motivated citizens. To be worthwhile, Green Papers must also be accompanied by a genuine concern by government administrators for public opinion. Critics have noted that some Green Papers have been used for strategic reasons with little regard for public input. Legislation may have already been drafted before a Green Paper was tabled. If these shortcomings can be overcome, however, Green Papers have the potential to be effective instruments of policy planning.

Many of these techniques are still in the experimental stage so a full evaluation of their effectiveness is difficult. In contrast, the public hearing is a long-established method of eliciting public opinion. Its practice has been widespread at all levels of government and its use has expanded into enquiries into natural resource development. An analysis of the public hearing technique will determine its role in encouraging public participation in environmental issues.

Chapter 3

PUBLIC HEARINGS

3 PUBLIC HEARINGS

A. BACKGROUND

Citizens and bureaucrats have favoured the public hearing as a means to raise issues relating to government policies and programmes (Waddell, 1981). It is probably one of the earliest methods of public participation used in contemporary society, and as such, it has acquired a high degree of legitimacy (Sewell, 1975; Sinclair, 1977). The benefit to the public is that a hearing is held openly and is often reported by the mass-media. Through the mechanism, citizens are given an opportunity to voice their opposition to a proposed course of action.

From an agency point of view, the public hearing is relatively quick, inexpensive and easy to administer compared to other participatory techniques (Shatzow, 1977). The agency can meet with a large group of people at one meeting, thereby reducing the number of public contact meetings. Public relations is enhanced as citizens perceive that the agency is making an effort to come before them and is giving the local people an opportunity to speak.

Definitions which describe public hearings often vary with the differing functions of hearings. For the purposes of this analysis, a public hearing will describe a large meeting in which a participant may present his case through predetermined testimony to a politically appointed commission, board or agency (Bosselman, 1969). Upon studying the evidence presented, the hearing board may make recommendations to the government (Emond, 1975; Sinclair, 1977).

B. FUNCTIONS

Public hearings can be held at different stages during the decision-making process. The timing of the hearings is important because it affects the degree of influence the public has in decision-making. The timing also affects the function the hearing will have. Heberlein (1976) outlines four functions of hearings which appear to correspond to the types of hearings which are described by Sinclair (1977). While the functions in any one hearing tend to overlap, usually a dominant one appears.

Preliminary hearings generally serve an informational function. They are held before a study begins, in order to generate information and opinions,

and to identify potential areas of conflict. Technical and planning reports may be available to the public prior to or during the hearings to inform the public of recent developments of a program. At this time, decision-makers clarify questions which the public has concerning the project. In turn, decision-makers can gain both factual information and insights into public attitudes (Plager, 1969). In a limited manner, public hearings draw out organized interest groups and other members of the public and provide a forum for communication between these groups and government (Swanson, 1971).

Pre-final decision hearings are used to receive reaction to general policies or programmes which are only tentatively adopted. These hearings can serve one of two functions; ritualism and co-optation. Ritualistic hearings are those that are required by law, but in general, there is not great demand from the public to become involved. Hearings which are required for certain licensing procedures fall into this category.

The co-optation function suggests that the public becomes involved in a meaningless way and unknowingly or even knowingly participates to serve the goals of the agency. In such a case, the agency allows the public its say — without any intention of allowing the public to influence the resulting decision. At its extreme, the agency could use the public hearing to mobilize support or opposition to its policy or plan (Jowell, 1969). Interest groups who oppose a particular project are usually divided in their reasons for opposition. Conversely, the agency usually is unified in its aim and is a stronger force than each of the individual interest groups. Because of its unity, the agency can play off different interest groups against each other. The result of such a procedure, however, is unsatisfactory to both public and government as the agency is discredited, accused of tokenism and manipulation, and the public remains voiceless.

Lastly, final hearings provide a forum for reactions to a definite proposal for action which is outlined in a final report or draft piece of legislation. As a subset to this type of hearing, Sinclair describes a hearing which is held to evaluate the plans of a project proponent to begin a specific large scale activity. The results of the hearing will form recommendations as to whether or not the proponent should be permitted to undertake the activity. One of the most open hearings of this type was that associated with evaluating the impact of a proposed natural gas pipeline through the Mackenzie River Valley. Hearings were held in Yellowknife, Northwest Territories, in twenty Arctic communities and in a number of cities throughout southern Canada. The timing, setting, length and format of the hearings were largely a reflection of the wishes of the participants.

The Mackenzie Valley Pipeline Inquiry served the most influential function — an interactive one. The Commissioner, Mr. Justice Thomas Berger,

was explicitly committed to determine what the people wanted and to respond to the needs which were expressed in the hearing. Public input had a major effect on the outcome of the recommendations. Perhaps more importantly, the publicity which accompanied the hearings served to educate all Canadians and to generate effective public pressure on the decision-makers to prevent the enactment of the development proposal. The resulting public influence became an important factor in the final decision to abandon the pipeline proposal through the Mackenzie Valley.

Although hearings at any stage in decision-making may be interactive, generally government bodies do not consult with the public unless public demand is great. Usually first order policy issues are resolved without substantial public influence. The interactive function is more likely to take place at a later stage in the decision-making process when the government addresses the importance of the issue to the public and cannot politically afford to make a final decision without consideration of public opinion.

C. CRITICISMS

While government officials may view hearings as an efficient means of collecting public opinion, a number of criticisms have been directed at the procedure. These shortcomings are generally voiced by citizens and public interest groups who fear that the structure of the hearing procedure may inhibit the quantity and quality of their input.

The public hearing has been criticized for its tendency to elicit participation from groups or individuals who do not necessarily represent the opinions of the public at large. The decisions which result from such misrepresentation may be contrary to the wishes of the broader group (Graham, 1973; Heberlein, 1976; O'Riordan, 1976; Sadler, 1977; Sewell, 1971; Sewell and Coppock, 1977; Sinclair, 1977; White, 1973). Usually those who attend the hearing have an obvious stake in the issue (Lucas, 1977; Sewell, 1975), and their contribution to the hearing tends to be negative (Sewell, 1975). One recent example of this kind of representation occurred during the EARP hearings on the Beaufort Sea Project, when one representative from the Canadian Arctic Resources Committee stated that he represented "the public interest". When questioned further to clarify what was meant by "the public interest", he suggested that "if they don't know, we tell them" (Cornford, Personal Communication, 1983). Sometimes a hearing only calls for those having objections so that those who have a strong preference for a particular project or policy are underrepresented (Sewell, 1971). According to Gilbert White, the result is

that "the hearing procedure tends to reflect only the known views of well identified members of interest groups . . . it airs the obvious without significant effect upon either the speaker or the listener" (1973, p. 165).

Wilkinson (1976) identifies three types of participants who tend to be involved in hearings. The first type is composed of professional experts — lawyers, engineers, government officials and professionals who represent interests of established groups. The Canadian Environmental Law Society is one such group. Participants from these groups are not intimidated by the procedure, are highly motivated to take part, are better informed than the average citizen and often contribute high quality information which they rightly believe will positively influence the decision-making agency. Other participants who contribute positively to the hearing are private citizens with a high motivation to overcome any intimidation which may be inherent in the formal setting. These individuals are generally those who would be directly and perhaps severely affected by the proposed project or policy. The final type of participant is one who is not familiar with, or is intimidated by the procedural requirements of the hearings. He testifies without a prepared submission, which usually results in a testimony which is long, rambling and impassioned.

The result of involvement by these types of participants is that the agency is generally influenced by the submissions of those who are better prepared and more articulate. Interest groups tend to be over-represented and more influential than individuals. Group participation, however, does not necessarily guarantee that the interests of the public have been heard. Those in favour of a particular policy or program may be under-represented as they tend to feel that the proposing agency will represent their interests.

People who have had little or no history of involvement in community affairs, either because of personal problems or feelings of hostility or skepticism, are unlikely to attend the public hearing because of their attitudes and inhibitions (Jowell, 1969). Others, usually individuals, may find the setting intimidating. Standing up in front of an audience to give an oral presentation to a hearing board is not a common experience for the average citizen.

Representativeness may be further inhibited by discretionary powers of an agency to determine the nature and scope of the inquiry. The hearing agency can effectively limit the entry of certain individuals or groups into the hearing forum by deciding who may participate. Unless all concerned citizens are invited to take part, the procedure cannot ensure a full and fair hearing of all possible views. The agency can also limit entry by structuring the hearing where and when it chooses (Morley, 1975). The setting may not elicit broad opinion if the location is set far away from the local area where the policy or project proposals would have the greatest effect. The timing of hearings may

be biased against groups of working individuals (Grima, 1977). Without a plan for follow-up procedures, there is no way of testing the effect of these discretionary powers.

Furthermore, the scope of the hearing may be restricted, because the kinds of questions which may be addressed by participants are often limited. Hearings held under statutes may only deal with narrow facets of larger, more complex developments. Typically, regulatory statutes only deal with one aspect of a particular development proposal. Developers may be able to obtain approval for a project based on a series of individual acceptable applications. The project proponents may commit large sums of money to the project based on the strength of these proposals, even before a final application is submitted (Lucas, 1972). This situation may effectively prevent participants from addressing the broader environmental, economic and social implications of the project.

The opportunity for the public to comment on the basic issues of a project proposal may be lost as the first order questions have already been decided at higher levels before the hearing is held (Lucas, 1972). Thus the hearing is reduced to a discussion of second order questions. The public may only be allowed to comment on the technical aspects of a project about which they may know little; while the broad policy issues such as environmental standards or the desired pace of development about which the public can make useful comment are not open to public scrutiny.

The formal nature of public hearings may cause them to be time-consuming and costly to both applicants and intervenors (Gibbs, 1971). The costs of preparing written submissions and obtaining scientific and legal aid are considerable for all who take part in the hearing process. Usually public interest groups are placed at a significant disadvantage when they try to produce testimony against a project applicant. The applicant may come to a hearing having spent years and perhaps hundreds of thousands of dollars hiring experts and compiling large volumes of documents in favour of its project. For example, the proponents (ESSO, Gulf and Dome) for the EARP Beaufort Sea Project hearings have spent approximately 15 million dollars to date for contracting the 39 consultant reports used as support documents as well as preparing a seven-volume environmental impact statement. Those who are opposed to the project, or who wish to participate to ensure that all the facts are before the hearing board, usually have neither the resources to examine adequately and respond to such extensive technical preparation, nor the resources to appear at the hearing through counsel. To balance the distribution of resources among all the participants and ensure that all participation is meaningful, interested members of the public require some mechanism of funding (Emond, 1978; Lucas, 1977; Lucas and McCallum, 1975; Morley, 1975).

To ensure effective participation, the public must be well-informed on all issues. Government secrecy has traditionally co-existed with public participation and it remains an obstacle which must be overcome if citizens are to contribute to the decision-making process in a meaningful way (Draper, 1977). Without ensuring that background data and reports are available well in advance of public consultation, it is not likely that the public can shed new light on the issues and implications of particular projects. In addition to written reports, public input can be enhanced through consultation with government experts before they are required to make submissions at a public inquiry.

Finally, the essence of these criticisms of the hearing procedure focuses on the discretionary nature of participation. Environmental quality decisions are not based on established standards or principles that can be universally applied. There is no method to test the correctness of a decision as any decision is based on the value judgements of the decision-maker. In the absence of such guidelines, the necessity to encourage a broad spectrum of opinion should be clear. The involvement of the public and its influence on the decision-making process depends largely on the favourable attitudes and perceptions of politicians and administrators. To make the hearing process effective, the rights of citizens to participate must be ensured by legislation (Emond, 1978; Fisher, 1978; Lucas, 1977, 1976, 1972; Morley, 1975).

D. REQUIREMENTS FOR A FULL AND FAIR HEARING

The right to participate will not necessarily ensure effective participation. Analysis of the literature suggests that at least six criteria must be fulfilled if the hearing mechanism is to provide for a full and fair hearing of all parties concerned. The following criteria will be examined in detail to determine how they are applied to Federal legislation dealing with northern transportation of natural gas:

1. that there should be a legislative requirement that all members of the public be given the right to participate in the resolution of environmental issues (Canadian Environmental Advisory Council, 1981; Elder, 1975; Emond, 1978; Franson, 1974; Lucas, 1977; Morley, 1975; O'Riordan, 1976; Sewell and O'Riordan, 1976);
2. that the legislation should provide for public participation early in the decision-making process when first-order questions are under review and before any irrevocable deci-

sions are made on a proposal (Berger, 1976; Elder, 1975; Emond, 1978; Franson *et al.*, 1973; Lucas, 1976, 1972; Lucas *et al.*, 1979; British Columbia Man and Resources Provincial Conference, 1973; Rees, 1979);

3. that there be sufficient notice of the hearing and its procedures to all interested members of the public (Wigmore, 1980);
4. that the public be assured of the impartiality of the board which is presiding over the hearing (Franson *et al.*, 1973; Lucas and Bell, 1979; Rees, 1980);
5. that all participants in a hearing have access to all relevant information and government expertise well in advance of the hearing (Canadian Environmental Advisory Council, 1981; Draper, 1977; Elder, 1975; Emond, 1978; Fox, 1979; Franson, 1974; Franson *et al.*, 1975; Jordan, 1972; Lucas, 1972, 1977; Peterson, 1972; Proceedings, 1973; Thompson, 1972);
6. that all interested persons be provided with research time and financial aid according to some predetermined criteria (Berger, 1981; Canadian Environmental Advisory Council, 1981; Elder, 1975; Emond, 1978; Estrin, 1977; Fox, 1979; Franson, 1974; Lucas, 1977; Nelson, 1977; Sewell, 1977; Thompson, 1972, 1977; Waddell, 1981).

A discussion of these requirements will illustrate their value in assuring a full and fair hearing procedure.

(1) Right To Participate

A legislative right to participate in a hearings procedure will not necessarily guarantee that a more fair decision will be made regarding a particular resource proposal (Wigmore, 1980). Provision for a wide range of public input, however, can help to identify and examine public concerns associated with a resource use proposal and may clarify these issues to the decision-makers.

In addition, open participation puts pressure on administrators to follow required review procedures and to give reasons for their decisions. As a result, the accountability of administrative and political procedures is likely to be rein-

forced (Anderson, 1971; Emond, 1978; Franson and Burns, 1974; Lucas and McCallum, 1974; Sewell and O'Riordan, 1976).

Without legislative requirement for public participation, public interests may be considered only by the favourable exercise of discretion contained in policy statements and guidelines. Because these guidelines cannot be enforced, the public has no assurance that their interests will be considered or that a meaningful examination of resource use proposals will be undertaken (Wigmore, 1980).

(2) Hearing Held Prior to Final Decision-Making

This right to participate can only be meaningful if it is provided early in the assessment of a resource use proposal. If first-order priorities such as the desirability of development are established before the public is consulted, then the value of citizen input is severely restricted. It is generally recognized that the public usually makes the most meaningful contribution to decision-making on these first-order priorities because they deal more with social attitudes and values than with technical considerations of a project proposal (Lucas, 1972). If irrevocable political or financial commitments are already made prior to public consultation, the result is less satisfactory and may actually only represent a token measure to satiate public demand.

(3) Sufficient Notice Of Hearing

Those who establish a public hearing should ensure that public interests are aware of its establishment and its procedural requirements for participation well in advance of the hearing date. There should be mechanisms in place where information on current and future proposals, and the status of their review, is available to all interested parties. The information should be presented in a clear and concise format, in non-technical terms so that it can be readily understood by all individuals. Information on hearing dates, times, location and participation procedures in advance of the hearing are necessary to allow the interested public members sufficient time to prepare a meaningful submission.

(4) Impartiality of Hearing Panel

If a hearing is to be a credible procedure, impartiality of its commissioner or hearing panel is essential. The panel must be acceptable to all interests in

the hearing, including the public, industry and government officials (Wigmore, 1980). A panel cannot be seen to favour one interest over another. Bias of the panel would jeopardize co-operation among all participants and would undermine serious consideration of its recommendations.

(5) Access To Information

Access by all participants to relevant information is necessary to ensure effective participation in the hearing procedure. It is important that background documents for resource proposals be available so that the significance of the impact of a proposal can be adequately assessed by members of the public as well as by the hearing panel.

The *Access of Information Act* was proclaimed in April, 1983. The proclamation of this Act may provide for greater accessibility and these implications are discussed further in Chapter 6.

(6) Access To Financial Aid

Financial resources and legal expertise are usually unevenly distributed among interest groups and organizations (Berger, 1977a; Franson and Burns, 1974). In resource proposals which require large expenditures of time and money, provision for research time and financing for qualified interest groups should be made available. Often interest groups have the expertise to provide a significant contribution to the hearing procedure but they lack the financial resources to prepare background materials and submissions for a hearing. Funding for these groups is essential if interests outside of industry are to have an influential voice in the hearings. Provisions for funding should not be made on a discretionary basis, however, but should be allotted according to some pre-determined criteria for which interest parties must qualify.

These criteria are essential for the establishment of a full and fair hearing procedure. A survey of the legislative provisions for public hearings in northern transportation projects will be analyzed to determine the extent to which they provide for the six criteria which have been identified.

Chapter 4

EXAMINATION OF LEGISLATIVE PROVISIONS

4 EXAMINATION OF LEGISLATIVE PROVISIONS

A. THE STUDY AREA AND THE ACTS WHICH APPLY

During the past decade, public hearings have been used extensively throughout Canada. Their use in the evaluation of resource development proposals, however, is a recent phenomenon (Wigmore, 1980). This is also the case in northern Canada where projects for exploration and exploitation of offshore energy resources have been subject to extensive assessments largely because of the unique social, economic and environmental values presented by the northern frontier (see Map 1).

In the northern territories, governing responsibilities are shared between the territorial government and the federal Department of Indian Affairs and Northern Development (DIAND). Other federal departments have responsibilities which are not fully dealt with by DIAND and the territorial governments. It is beyond the scope of this paper to analyze the inter-governmental responsibilities, but it is useful to note that they are less rigidly defined than responsibilities within the provinces.

Proposals for northern resource development must qualify for a series of major approvals to carry out exploration, development and transportation components. A survey of legislation pertaining to the transportation of natural gas to southern markets was conducted to determine what provisions were outlined for the establishment of public hearings.

It was found that the legislation which applies to the transportation of natural gas from the Arctic to southern markets depends on the means of transport and the ultimate destination of the product (Lucas *et al.*, 1979). Any project which includes an export component must be reviewed by the National Energy Board. A pipeline proposal which crosses a provincial boundary is also subject to National Energy Board approval. Transportation by tankers, without export, is regulated primarily by the Department of Indian Affairs and Northern Development and Transport Canada. There is a series of statutes which apply to transportation projects. The following list represents the main set of legislation with which the petroleum industry must comply before transportation projects are approved:

1. *Canada Oil and Gas Production and Conservation Act*, (R.S.C. 1970; C. 0-4);

THE CANADIAN ARCTIC

GREENLAND

LABRADOR

LABRADOR SEA

DAVIS STRAIT

HUDSON STRAIT

HUDSON BAY

FOX BASIN

BAFFIN BAY

BAFFIN ISLAND

VICTORIA ISLAND

BEAUFORT SEA

ALASKA

YUKON

RICHARDSON MOUNTAINS

MACKENZIE MOUNTAINS

MELVILLE HILLS

BRITISH MOUNTAINS

McCALL GLACIER

Point Barrow

Prudhoe Bay

Barter Island

Demarcation Point

King Point

Shingle Point

Aklavik

Fort McPherson

Inuvik

Tuktoyaktuk

Cape Bathurst

Paulatuk

Amundsen Gulf

Prince of Wales Strait

Sachs Harbour

Jonson Point

Banks Island

McClure Strait

Mould Bay

Prince Patrick Island

Jackes Is.

King Christian Is.

Donne-McLean

Loughhead Is.

Meveling Is.

Rea Point

Byam

Derry Str.

Queen's Ch.

Resolute Bay

Barrow Str.

Lancaster Sound

Arctic Bay

Pond Inlet

Bylot Island

Navy Board Inlet

Devon Island

Vonzes Sound

Chill Gate

Smith Sound

Thule Bay

Cape York

Upemavik

Northwest Is.

Disc Bay

Cape Hooper

Broughton Island

Cape Oyer

Pangnirtung

Ellesmere Island

Tadqary Fiord

Eureka

Nares Strait

Bering Strait

GULF OF ALASKA

2. *Territorial Lands Act*, (R.S.C. 1970, C. T-6);
3. *Territorial Land Use Regulations*, (SOR/77-210);
4. *Canada Oil and Gas Drilling and Production Regulations*, (SOR/61-253);
5. *Navigable Water Protection Act*, (R.S.C. 1970, C. N-19);
6. *Arctic Waters Pollution Prevention Act*, (R.S.C. 1970, C02 [1st Supp.]);
7. *Canada Shipping Act*, (R.S.C. 1970, C. S-9);
8. *National Energy Board Act*, (R.S.C. 1970, C. N-6).

In addition to these provisions there are acts which seek to protect wildlife and the environment which can also affect transportation projects. While these statutes usually concern a specific subject, they have wide potential application for land use projects. The following Acts are important for transportation proposals:

1. *Canada Wildlife Act*, (S.C. 1973, C-21);
2. *Fisheries Act*, (R.S.C. 1970, C. F-14);
3. *Northern Inland Waters Act*, (R.S.C. 1970, C. 28 [1st Supp.]);
4. *Migratory Birds Convention Act*, (R.S.C. 1970, C. M-12);

In addition, the Environmental Assessment and Review Process, established in 1973 through the Department of the Environment, also has direct influence on northern development.

Of these provisions, only four provide for public participation in the form of public hearings. They are the *Northern Inland Waters Act*, the *Territorial Lands Act*, the *National Energy Board Act* and the cabinet directive which establishes the Environmental Assessment and Review Process. In addition, public hearings may be held under the authority of the *Inquiries Act*.

The *Inquiries Act* R.S.C. 1970 may be applied for any reason, without limits on its scope, subject matter or location except when enacted by Parliament. This Act will be outlined in a cursory manner to determine its possible applications in the assessment of northern transportation projects. Focus of this section will be on the other four provisions which were identified.

Public hearings are established under the authority of the responsible minister(s) using a variety of procedures including the following:

1. where legislation indicates when there is an alternative to establish hearings, as in the *Territorial Lands Act* (Section 19[h]) and the *National Energy Board Act* (Section 20[3]);
2. where legislation states that hearings should be established to serve a regulatory function such as the issuance of a licence or certificate, as in the *Northern Inland Waters Act* (Section 15[2]) and the *National Energy Board Act* (Section 20[1]);
3. where legislation may not exist, in which case Cabinet directives provide the necessary authority as in the Environmental Assessment and Review Process.

Usually, public hearings are held as a result of specific project proposals and are not initiated for the evaluation of policy programmes (O'Riordan, 1976; Waddell, 1981).

B. NORTHERN INLAND WATERS ACT

The *Northern Inland Waters Act*, proclaimed February 28, 1972, provides the legislative framework for the management and development of water resources in the northern territories. The Act proclaims that all fresh water and rights to its use, except for limited uses, are vested in the Crown and may not be appropriated for any purpose without a licence (Section 3). To carry out the licensing procedure, a water board was established in each territory. Cabinet can make regulations regarding the procedure on licence applications and the type and form of information in support of licence applications which are filed with a water board (Section 26[a][b]).

The responsible water board, in turn, is empowered to hold public hearings over applications within the territories as it considers appropriate and to conduct hearings throughout Canada if they are warranted by general public interest (Section 15.1). Once an application is filed, the board is required to give notice that a public hearing will be held. Notice must be given by applicants in the *Canada Gazette*, and in the daily newspapers which circulate within the affected area as the board considers appropriate (Section 17). In addition, the water board must also publish a notice in the *Canada Gazette* and in any other appropriate manner (Section 17).

The hearings which follow may be of two types. Hearings held under Section 15(1) are discretionary hearings regarding issues of water use, planning and management in the territories. They are generally intended to gather

information before the development or review of a policy (Franson *et al.*, 1973). Hearings held under Section 15(2) must be conducted for all water-use licence applications, amendments or renewals. Applications may include a road or pipeline crossing of a territorial water course.

Following public hearings, the water board forwards its recommendations to the minister of DIAND, who either approves or rejects these recommendations. In the case of water-use licences, the minister can either approve the licence and the conditions attached to it or reject the recommendations and return the application to the appropriate water board. Alteration of the conditions attached to the proposed licence by the minister is not permitted.

Authority for water use can be granted without a public hearing if the Controller of Water Rights is satisfied that the use falls within certain specified categories. One of these uses is for commercial projects, as long as it does not exceed 50,000 gallons per day for a period of no more than 270 days. This use, therefore, is suitable for most construction projects including exploratory drilling. Water engineering purposes can also be exempt from licencing and hearing procedures. This use allows for the laying of a structure or device, including a pipeline, in any waters (see *Northern Inland Waters Regulations*, Section 11).

Other uses such as municipal and mine requirements need a water-use licence. In these cases, public hearings can be avoided if two conditions are satisfied: first, that the applicant consent in writing to the disposition of the matter without a public hearing; and second, that no other person expresses written intention to appear and make representation in respect of the application (Section 15[2]).

There are no rules or regulations in the Act which outline the procedures to be followed during a hearing. At their discretion, the water boards make rules regarding the sittings and the procedures for making representation. In the case of licence hearings, at least one written intention to appear is necessary to guarantee a hearing. Beyond this, the Act does not indicate important information such as who may appear and participate, whether briefs must be filed and what time limits may be imposed (Franson, *et al.*, 1973). Thus the Act does not specifically constrain the board in the structuring of hearings. The only constraints are common law requirements that the hearings be fair and consistent with the rules of natural justice (Elder, 1975).

This Act could potentially be used to assess all water crossings associated with a major pipeline proposal. To date, there have been at least 76 hearings held in the Yukon and Northwest Territories in response to water licence applications (Waddell, 1981). The hearings have not been used to assess the acceptability of a major transportation project as a whole. The

hearings have usually lasted less than a day, and involved local comment on a local proposal. While numerous, hearings held under the Act have maintained a low profile nationally.

C. INQUIRIES ACT

The *Inquiries Act* provides for public inquiries on “any matter connected with the good government of Canada or the conduct of any part of the public business thereof” (R.S.C. 1970, C.173, S.2). Under the Act, royal commissions may be established to facilitate the expression of public opinion and to gather and transmit that opinion to decision-makers. There are at least 47 federal statutes conferring powers of inquiry which refer to the *Inquiries Act* (Law Reform Commission of Canada, 1977).

Use of the royal commission to develop policy has at least three characteristics: it is public, it is *ad hoc*; and it is investigatory in its operation. Royal commissions have provided well-established avenues for making public statements and presenting public opinion on desirable courses of action. While in some cases opportunity to participate has been restricted, often general invitations have been issued to anyone who has expressed a desire to submit a brief or memorandum. In most cases, the findings of a commission are open to public scrutiny (Doern, 1967). Royal Commissions are established in response to an issue of public importance over which there is substantial public concern. They are undertaken when the usual legislative provisions are deemed inappropriate for resolving the public issue (Smith, 1982). Finally, the inquiry process is an information-gathering process involving the identification, assimilation and analysis of all relevant information on a given problem. The process does not seek to measure public opinion, but rather to encourage public input from a wide variety of sources.

Once the information is assembled and assessed by a commission, a summary of the findings and a list of recommendations are brought together in report form and given to the responsible minister(s). The report is then used as a tool for political decision-making. The Government may choose to take no action at all, limited action, or it may accept and act on all the recommendations of the commission.

The ultimate authority of any inquiry is advisory. The establishment and the acceptance of its recommendations are at the discretion of political decision-makers. A royal commission cannot promise continuity between recommendation and execution of action. The effectiveness of any inquiry is greatly influenced by its terms of reference established by Cabinet and by their

interpretation by politicians, public servants and by the commissioner of the inquiry (Smith, 1982; Wigmore, 1980). To bring about effective public participation, a public inquiry must ensure that the issues under review are clearly defined for all concerned and that the commission has a mandate to review basic policy assumptions. Finally, an inquiry must be given the time, staffing and monetary resources to ensure that participation is encouraged in a full and equitable manner (Smith, 1982; Wigmore, 1980).

To date, the *Inquiries Act* has not been used to assess any northern transportation projects. Members of both industry and government have stated that there will not be another inquiry like Berger's because of the broad mandate of the hearings, the length of time they took to complete and the cost of the process (Lucas *et al.*, 1979). Since his inquiry, however, there have continued to be a number of federal and provincial commissions established to inquire into aspects of energy projects. They include the Alaska Highway Pipeline Inquiry, the Royal Commission on the Northern Environment (Ontario) and the Royal Commission on Uranium Mining (Saskatchewan). The West Coast Oil Ports Inquiry was established under the *Inquiries Act* to investigate the "environmental, social and navigational safety aspects of oil port proposals and the general public concerns about oil tanker traffic on the west coast of Canada" (Thompson, 1978, p1). Given these precedents and appropriate political pressure, an inquiry, under the *Inquiries Act*, for the assessment of natural gas transportation projects remains a genuine possibility (Lucas *et al.*, 1979).

D. TERRITORIAL LANDS ACT

At least forty additional federal statutes can confer powers of inquiry without referring to the *Inquiries Act* (Law Reform Commission of Canada, 1977). The *Territorial Lands Act*, passed in 1952, is one such act. The Act outlines the responsibility for, and control of, crown lands in the territories, including surface and subsurface rights. Under section 19(h), Cabinet may appoint a person(s) to conduct an inquiry into the specific land use proposals and to advise the minister of Indian Affairs and Northern Development as to public opinion regarding the acceptability of the proposal and about specific terms and conditions attached to land use permits. At least two important inquiries have been conducted under the authority of this Act, the Mackenzie Valley Pipeline Inquiry and the Alaska Highway Pipeline Inquiry. Because of the precedents it set in scope and procedure, the Mackenzie Valley Inquiry will be highlighted. Its importance in this discussion is that it is probably the first

public inquiry in the Arctic to meet all the requirements as set out in this paper for a full and fair public hearing.

The Mackenzie Valley Pipeline Inquiry was established by an Order in Council on March 21, 1974, under Section 19(h) of the *Territorial Lands Act* (Berger, 1977b). Mr. Justice Thomas Berger was appointed as its commissioner. The incentive for the Inquiry resulted from an application by Canadian Arctic Gas Pipeline Limited to build a large diameter gas pipeline across the northern Yukon and up the Mackenzie River Valley. The Inquiry was commissioned to "... inquire into and report upon the terms and conditions that should be imposed in respect to any right-of-way that might be granted" (PC 1974-641). Berger described the government initiative as unique because "for the first time, we sought to determine the impact of a large-scale frontier project before, and not after, the fact" (Berger, 1981, p379).

The scope and procedure of the Inquiry has since been hailed as an historical landmark (Draper, 1977; Sadler, 1977). Berger took positive steps to ensure that the proceedings were fair and complete for all participants. The issues which were raised went well beyond whether or not to build a pipeline. They also included the right and nature of public participation in decision-making, the cultural and environmental context in which development was proposed and an examination of the long-range implications of change. To review these issues, the Inquiry included 269 days of northern hearings and 19 days of southern hearings. In spite of the immediate economic and political pressures, the Mackenzie Valley Pipeline Inquiry was the longest public hearing ever conducted in the north (Waddell, 1981).

Berger's approach was perhaps unique to Royal Commissions because it actively sought out and encouraged representations from all potential participants. To accommodate the needs of the participants, Berger adopted three types of hearing formats. Preliminary hearings were held to discuss and establish the rules of conduct for the remainder of the Inquiry. Formal hearings based on the legal model were held both in northern and southern Canada to provide a forum for technical debate and presentation of development proposals. Finally, 35 community hearings were held in the Yukon and Northwest Territories and in ten cities across southern Canada. These hearings were informal in nature and allowed residents and interested persons to express their views and concerns freely.

Prior to the hearings, a community information programme was established to educate the native population on the important aspects of natural gas and pipelines. The community hearings were delayed to allow native field workers to accomplish these educational goals. The pipeline proponents also undertook information programmes. In conjunction with these initiatives, cir-

culars and a newspaper were produced explaining the objectives and procedure of the Inquiry in basic terms. Background "issue papers" were prepared which were used in a series of public information hearings which preceded the final hearings (Lucas, 1977).

At the preliminary hearings, Berger heard submissions by environmental and native groups that they would not be able to participate meaningfully unless they were provided money for research. As a result, the Inquiry provided funding for research and studies for those groups that had an identifiable interest in the Inquiry but whose means would not allow for their representation (Berger, 1981). The Inquiry contributed \$540,000 to qualified public interest groups including the Northwest Territories Association of Municipalities, the Chamber of Commerce and the Mental Health Association. In addition, the Department of Indian Affairs and Northern Development contributed \$1.2 million directly to native groups to facilitate their educational program and the participation at the Inquiry (Waddell, 1981).

These funds were allocated to groups that fulfilled the following five criteria set by the Inquiry:

1. There should be a clearly ascertainable interest that ought to be represented at the Inquiry.
2. It should be established that separate and adequate representation of that interest would make a necessary and substantial contribution to the Inquiry.
3. Those seeking funds should have an established record of concern for, and should have demonstrated their own commitment to, the interest they sought to represent.
4. It should be shown that those seeking funds did not have sufficient financial resources to enable them adequately to represent that interest, and that they would require funds to do so.
5. Those seeking funds had to have a clearly delineated proposal as to the use they intended to make of the funds, and had to be sufficiently well-organized to account for the funds.

(Berger, 1981, p384).

As well as ensuring the participants had access to necessary funding, Berger stipulated at the beginning of the Inquiry that all information presented

at the Inquiry would be available to all identified participants (Smith, 1982). Berger sought to ensure that all studies and reports held by the pipeline companies, government and other parties were made available, so that no information which had a bearing on the work of the Inquiry would be concealed. The federal government gave the Inquiry the power to issue subpoenas to get all the evidence it needed. As a result of these measures, access to information did not hinder the participation of any identified interest group.

Because of its sincere attempt to provide a full and fair hearing for all participants, the Mackenzie Valley Pipeline Inquiry is regarded by many as a considerable achievement both as a process and in regard to its impact on northern resources development issues (Gamble, 1978; Gray and Gray, 1977; Lucas, 1977). The Inquiry established a general model which was followed, with minor variation, by a number of subsequent inquiries into natural resource proposals and policies such as the West Coast Oil Ports Inquiry.

Following Berger's suggestion that a natural gas pipeline along the Alaska Highway could be more environmentally acceptable (Berger, 1977a, p49-50), the Canadian Government decided to conduct an assessment of the Alaska Highway pipeline route. As a result, the Alaska Highway Pipeline Inquiry was established in April 1977, under the guidance of Mr. Justice Kenneth Lysyk, to examine, in a preliminary way, the socio-economic implications of the project.

The format of these hearings paralleled those of Berger. The Inquiry provided a total of \$49,000 to qualified interest groups, while the Department of Indian Affairs and Northern Development provided \$140,000 (Waddell, 1981). Lysyk also made the hearings physically accessible by holding both formal and informal hearings, travelling to a number of communities to hear representations from local residents (Lysyk, 1977, p5).

The duration of the hearings was curtailed, however, as recommendations were necessary before September 1, 1977 when Canada was required to provide its position on this route to the United States. Because of this time limitation, a full hearing to determine the appropriate socio-economic terms and conditions was not undertaken. As a result, Lysyk recommended that a single agency should be formed to conduct an inquiry to establish these terms and conditions (Lysyk, 1977, p138).

Based on this recommendation, the Northern Pipeline Agency was created by the *Northern Pipeline Act* of 1977 to facilitate planning and construction of the Alaska Highway gas pipeline, bringing into effect an agreement signed September 20, 1977 between Canada and the United States (S.C. 1977-78, C.20). One of its objectives, to account for local interests in planning (Section 3[c]), gave rise to a public hearing in the spring of 1979. The agency

held joint hearings with FEARO in the Yukon to receive comment on draft environmental and socio-economic terms and conditions outlined by the agency as well as the environmental impact statement prepared by the proponent. These joint hearings were intended to reduce the duplication of effort by the Northern Pipeline Agency and FEARO to allow the public to present submissions to only one set of hearings. The hearings will be described at greater length when the Federal environmental assessment and review process is discussed.

The function and practice of the Northern Pipeline Agency and its governing Act will not be assessed because their enactment does not have general applicability to northern transportation projects. They were created in response to a specific agreement between Canada and the United States and their powers are limited to jurisdiction over the Alaska Highway pipeline only. It is unlikely that similar agencies would be established for all other transportation projects as there is no trend in this direction. The present provisions have continued to be used throughout the North, indicating that they will not likely be replaced by a single planning and management body.

E. NATIONAL ENERGY BOARD

The National Energy Board (NEB) was established in 1959 to manage the export of natural gas. The powers and duties of the Board fall into two categories: advisory and regulatory. Part II of the *National Energy Board Act* deals with the advisory role of the NEB, providing recommendations to the Minister of Energy, Mines and Resources (EMR) on all forms of Canadian energy matters. Parts III, IV and VI of the Act deal with the regulatory aspects of oil, gas and electric power giving the Board jurisdiction over: the issuing of certificates of public convenience and necessity for interprovincial and international pipelines and international power lines; regulations for pipeline safety and transportation charges; and authorizations for the export of oil, gas and electricity and the import of gas, respectively (Lucas *et al.*, 1979; Waddell, 1981).

As an advisory body, the NEB is empowered to monitor and report to the Minister of Energy, Mines and Resources on all aspects of federal energy policy. The Board is required to study, review, report and make recommendations on matters related to energy or any energy source and on the appropriate national and international co-operative arrangements. To carry out these functions, the Board is given the formal investigative powers under Part I of the *Inquiries Act* (Section 24). The recommendations resulting from an in-

quiry are reported to the Minister of Energy, Mines and Resources and, therefore, do not serve as a means of direct regulation over any particular transport proposal or development. The National Energy Board also performs a number of regulatory functions which deal with the transportation, pricing, import and export of electric power, natural gas and oil.

The provision to hold hearings is not stated explicitly. There is no express requirement in the Act that the Board hold a hearing in respect of the issue of either certificate of public convenience and necessity or an export licence (Fisher, 1971; Lucas and Bell, 1977, Lucas *et al.*, 1979). In the event that the National Energy Board decides to hold a hearing, the Act states that hearings held with regard to the issue of certificates or licences must be made public (Section 20[1]), with certain minor exceptions.

Upon applications for certificates, the Board is required to consider the objections of any interested person (Section 45). The Board, however, is empowered to decide who constitutes an interested person, and its decision is final (Section 45). Thus the status to appear before the Board depends on its discretion in any particular application. Other procedures in National Energy Board hearings may also inhibit successful participation by public interest groups.

Once a hearing is established, notices must be published in specific newspapers at least four weeks before the hearings, and specified notices are required to be sent to the Provinces and interested persons (Lucas and Bell, 1977, p62). This system of notification has been criticized for a number of reasons. Interested persons are not defined, but past practice indicates that it means other companies involved in the industry (Fisher, 1971). Generally other parties in industry including producers and gas companies are made aware of the proceedings. The public at large, however, may not be adequately notified. Notices are not necessarily published in all the newspapers in a city. Sometimes the notices are only carried for a day (Fisher, 1971). In addition, they tend to be phrased in highly technical language which may be difficult to understand for members of the public who might otherwise participate (Lucas and Bell, 1977). In this manner, the notification system for hearings may favour those in industry to the exclusion of other interested groups or individuals. The hearing procedure which the National Energy Board has adopted may also hinder full and constructive public participation.

Public hearings established by the Board are formal and based largely on court models. All participants may be represented by counsel and there are many rules concerning the production and assessment of documents and the examination and cross-examination of witnesses. These procedures require legal, technical and scientific expertise to review applications and other relevant

documentation, prepare direct testimony, draft questions and advise on cross-examination. A well-prepared intervention before the Board, supported by expert testimony and represented by experienced counsel would be very costly and probably prohibitive to poorly funded public interest groups. One estimate in 1973 of the cost of an adequate, but modest presentation at a hearing on a northern pipeline issue is \$100,000 for investigations, briefings, and sittings lasting thirty days (Franson *et al.*, 1973).

In addition to monetary constraints, the public at large is also placed at a disadvantage in terms of the time they may be allotted to draft a submission. While the applicant may have had months to prepare its submission, an intervenor generally has less than four weeks to prepare a statement. As a result, this submission may be limited in scope to a statement of intention to support or oppose the application and the general arguments offered. Many interventions, especially if they relate to complex hearings, are filed with at best a cursory review of the application. Often public interest groups cannot afford the time and money to make a trip to Ottawa to review the public files of the National Energy Board (Plager, 1969).

Usually intervenors must wait until oral testimony is presented to the Board before they know exactly how an applicant will support the information in his application. Without any time to organize, interest groups may find it difficult, if not impossible, to challenge the expert testimony presented by the applicant.

Thus the lack of adequate information and sufficient time to develop a thoughtful submission may place an intervenor at a distinct disadvantage to the applicant. The cost to hire technical experts to help prepare testimony may be prohibitive to the average public interest group. The National Energy Board has no history of making information or funds more readily available to potential intervenors. The result may be poor quality testimony or even the exclusion of public members from the hearing procedure.

The National Energy Board has initiated two sets of public hearings associated with the transportation of natural gas from the north. The first was the Mackenzie Valley-Yukon Pipeline Hearing held to deal with three applications for a certificate of public convenience and necessity. Two applications were proposals for a gas pipeline in the Mackenzie Valley, while the third was for a gas pipeline along the Alaska Highway. This third proposal was supported by the National Energy Board and a conditional certificate was granted.

The most recent hearings were initiated to review the northern components of the Arctic Pilot Project, a proposal to extract natural gas from north of Melville Island, transport it by pipeline to Bridport Inlet, liquefy it and ship it to southern Canada along the East Coast. In addition, since the Arctic Pilot

Project initially proposed to export natural gas to the United States, the National Energy Board was required to hold hearings on an application for an export licence. The hearings began early in 1982, but have since broken down because their terms of reference were altered and public intervenors contended that this alteration constituted an entirely new proposal. As of this writing, hearings have not resumed.

F. ENVIRONMENTAL ASSESSMENT AND REVIEW PROCESS

The Environmental Assessment and Review Process (EARP) was established on December 20, 1973, by a Cabinet decision, and revised on February 15, 1977. The major objective of the Process was to ensure that the environmental effects of federal programmes and projects were considered early in the planning stages so that decisions could be made to avoid or mitigate environmental impacts (FEARO, 1979). All federal department agencies are bound to the process with the exception of proprietary Crown Corporations and federal regulatory agencies.

Since 1974, the Environmental Assessment and Review Process has become the most important means by which the federal government has evaluated large scale resource development proposals in terms of their environmental, social and technical impacts (Sewell and Foster, 1981). While the process is Canada-wide in scope, of the sixteen projects which have held hearings, seven have involved proposals in northern Canada (Waddell, 1981). Thus it has become a forum for northern residents to allow public input on issues such as the pace and scale of resource development and the future of the local people within the context of development.

The Process may involve up to three sequential review stages, the first two of which involve self-assessment by the federal agency initiating the project. The initial environmental screening is conducted by line departments and agencies to determine if projects are likely to have significant environmental effects. If this assessment proves positive, projects are referred to the Federal Environmental Assessment and Review Office (FEARO) of Environment Canada for formal review. To conduct the formal review, an independent review panel is established.

The panel may consist of persons from government (federal, provincial and/or territorial) and the private sector. Members are appointed by the executive chairman of FEARO in the case of federal public servants and by the minister of Environment Canada in the case of all others (Waddell, 1981).

The panel is responsible to prepare and issue guidelines for an appropriate environmental impact statement which is prepared by the project proponent together with its sponsoring agency (Sewell and Foster, 1981). Once the statement is submitted to the Panel, both the guidelines and the statement are made available to the public and other technical agencies of government for, at the least, thirty days. After the information is issued, the Panel arranges public meetings and hearings to hear the concerns of those who may be affected by the project. Generally, hearings are held in communities most likely to be affected by the project. In unusual cases, the minister(s) has the power to withhold information on a project from the public. As yet, no minister has chosen to do so.

While the potential for public involvement in the review process is great, in practice public participation is wholly dependent upon the favourable discretion of the minister of the initiating agency and the review panel. Each step of the review process is subject to discretion, from public review of the guidelines for the preparation of an environmental impact statement, through publication of the impact statement, to a public hearing to evaluate the statement (Emond, 1978). The attitude of the government is made clear in the following passage from the Guide which it published in 1977:

The federal assessment process attaches great importance to anticipated public concerns in determining the "significance" of potential adverse environmental effects. On the other hand, a Panel established to make such judgments must weigh the extent of such reaction and its validity in terms of the scientific and technical factors involved when making its recommendation (Fisheries and Environment Canada, 1977, p15).

Thus the guide provided no assurance that members of the public will be invited to participate in the review process.

The procedures also lacked a mechanism which would give the public access to the background information regarding the proposal and upon which the environmental impact statement is based. There is no provision established to ensure the public have input in the formation of guidelines or in the preparation or assessment of alternatives (Emond, 1978).

In 1977, an amendment was approved by Cabinet that required that federal departments and agencies ensure that the public is informed and consulted at an early stage in the planning of significant projects (Emond, 1978). While the amendment was hailed by government at the time of its enactment, it has since been severely criticised by public members. This amendment did not

grant a statutory provision for public participation during the initial environmental screening procedure. Neither did the amendment establish guidelines concerning what constitutes a significant project. This decision still rests with government officials without influence of the public. The amendment does not indicate what type of information will be made public, nor does it describe how it will be publicized. Finally, the new legislation does not provide a mechanism for obtaining public input which may be required from the early dissemination of information.

Criticism has also arisen because bureaucrats and applicants do not appear to take the government guidelines seriously. The suggested deadlines for the submission and circulation of environmental impact statements and subsequent reviews are often ignored or missed by participants. Key documents such as agency reviews and comments on the impact statements are often not available until just prior to, or at public information meetings. Restricting the availability of information through sloppy enforcement of the guidelines undermines the preparation of a deficiency statement and reduces the opportunity for effective participation by the public (Rees, 1980). Without any legislative provision giving members of the public the right to participate and to obtain access to information, the Environmental Assessment and Review Process cannot ensure the public of an effective means of participation.

A number of hearings held under the Federal Environmental Assessment and Review Office have dealt with the transportation of natural gas. The Yukon portion of the proposal by Foothills Pipe Lines Ltd. to construct a gas pipeline along the Alaska Highway was referred to FEARO on March 21, 1977. At this time, a panel was established to review existing data and seek public and professional opinion concerning the comparative environmental impacts of the Mackenzie Valley and Alaska Highway routes. The federal government requested the panel's report by August 1, 1977 because it faced a major decision on competing pipeline proposals in September. This short lead time made a normal environmental assessment impossible, and the panel recommended that if the Alaska Highway route were approved, a complete environmental assessment and review process should be undertaken (FEARO, 1977).

A second phase of hearings was undertaken in April 1979 through a joint effort of the Northern Pipeline Agency and FEARO. Both technical and community hearings were held to allow public comment on the draft socio-economic and environmental terms and conditions for the pipeline prepared by the Northern Pipeline Agency and the environmental impact statement prepared by the proponent.

The hearings were not well attended due to a developing apathy among local and environmental groups towards the hearing procedure (Rees, 1980;

Waddell, 1981). Several environmental groups saw little value in attending as they perceived that their concerns had already been raised at the Mackenzie Valley Pipeline Inquiry, the Alaska Highway Pipeline Inquiry and the interim environmental assessment hearings without coming closer to resolving many outstanding issues such as native land claims (Waddell, 1981). These groups also criticized the lack of funding provided for the hearings.

As a result of the hearings, the Northern Pipeline Agency submitted its terms and conditions, with minor changes, to the Governor in Council for approval. The EARP panel recommended that the proponent prepare a revised environmental impact statement to deal with certain aspects of engineering design which would be reviewed on completion. After revision of the environmental impact statement, three days of technical hearings were held in Whitehorse which dealt with alternative pipeline routes in the Whitehorse area. After the hearings, the panel recommended that an alternative route be established in the Whitehorse area (Waddell, 1981).

Two hearings were held in the assessment of proposals for exploratory oil drilling. While not directly related to natural gas transportation projects, they are mentioned here because a regional approach was taken for both hearings which served to assess these areas in terms of corridors. The first of these hearings concerned the Eastern Arctic Offshore Drilling — South Davis Strait Project. The hearing panel made recommendations that the exploratory drilling could proceed as proposed provided certain terms were met (Waddell, 1981). A number of criticisms were directed at the hearing procedure by public participants including lack of funding, narrow terms of reference and lack of time to permit the local communities to prepare submissions for the hearing (Waddell, 1981).

The second set of hearings was held during 1978 over the proposal by Norlands Petroleum to drill an exploratory well in Lancaster Sound. Again a regional assessment approach was undertaken. The panel recommended in its report that the proposal be deferred until the proponent could demonstrate its ability to deal safely and effectively with the hazards of Lancaster Sound and outstanding socio-economic issues were resolved. Since then, a regional study for Lancaster Sound was undertaken by the Federal Government. The resultant Green Paper was published in January 1982 (Canada - Indian Affairs and Northern Development, 1982). A reorganized group of operators has since reapplied to drill in Lancaster Sound.

Environmental assessment hearings were also held in 1979-80 for the Arctic Pilot Project, a proposal co-sponsored by Petro-Canada, Nova, Melville Shipping and Dome Petroleum. This proposal was intended at that time to transport liquefied natural gas throughout the year by tankers from Melville

Island to eastern seaboard markets. Hearings addressed both environmental and socio-economic concerns to avoid a second set of hearings. The Department of Indian Affairs and Northern Development provided the Inuit Tapirisat of Canada with \$32,050 to assist the Inuit in preparation for the hearings. Following the hearings, the panel recommended that the northern portion of the project is environmentally acceptable provided that certain conditions are met (Waddell, 1981).

The hearings on the Beaufort Sea Project have dealt with economic, environmental and socio-economic implications of exploration and development of hydrocarbons in the Beaufort Sea. A pilot funding program was established making funds available through an independent committee which reports to the executive chairman of FEARO. The funds have come from the Department of Indian Affairs and Northern Development which initiated the Beaufort review. Since 1981, \$960,000 have been allocated through this mechanism.

Chapter 5

ANALYSIS OF ISSUES

5 ANALYSIS OF ISSUES

A. DISCRETIONARY POWERS

The central issue which emerges from this sample of legislation is the extent and scope of discretionary powers which are available to government decision-makers. Government administrators have the powers to make policy decisions such as environmental quality standards, to impose regulations such as granting export licences, and even to determine what constitutes the public interest (Sewell and O'Riordan, 1976). There is no legislation among this brief survey that states that a minister or regulatory agency shall identify and assess all significant effects of a proposal prior to a decision. There are no guidelines which establish the kinds of issues which require input from citizens, identify relative publics or outline specific procedures for obtaining representative points of view. In Jordan's opinion:

There is no positive obligation on the Minister to make information (general or specific) available to the public. The decision by the Minister concerning approval or rejection of (any) proposal is made only on the basis of the actor and by the advocacy of the actor. The public has no *right* to participate in the process of decision-making (Jordan, 1972, p14).

Without rights to participate, there are only opportunities which the Minister, in his discretion, may or may not provide (Lucas, 1976).

The decision to establish public hearings, therefore, remains the responsibility of the government (Waddell, 1981). The statutes which provide for a public hearing are framed in permissive, not mandatory language. The words in key authorizing sections are discretionary in nature. Thus, in the absence of legislative guidelines, agency decision-makers are wholly responsible to determine the desire for or necessity of a public hearing, the public members who will be invited to participate, the issues which will be discussed and the influence the process will have on decision-making. These powers effectively make public participation subject to the constraints of time, cost and access to information which are imposed by government officials.

The format of public hearings is also largely controlled by government. Public access to the hearings can greatly effect the quality and quantity of inter-

ventions. Government can control access by determining the location and duration of the hearings, and establishing time periods for information exchange and assessment. Generally, advisory hearings are, by their design, more accessible than regulatory hearings (Waddell, 1981). Access may be encouraged by hearings travelling to the public, as is provided by the *Northern Inland Waters Act* (Section 15.1). The precedent set by Berger in establishing mobile community hearings was a positive one in terms of enhancing public accessibility. His example has since been followed by subsequent hearing boards established under the *Territorial Lands Act* (Alaska Highway Pipeline Inquiry), the *Inquiries Act* (West Coast Oil Ports Inquiry), the Federal Environmental Assessments and Review Office (Alaska Highway Gas Pipeline Project Hearings) and the recent hearings on the Beaufort Sea Project.

Certainly, in terms of physical access to public hearings concerning resource development, the exercise of discretionary powers has been favourably applied in recent years. In terms of the five criteria which were established previously in this paper, some important questions arise. "Do the discretionary powers in the legislation sampled provide for a fair and complete hearing of public opinion?" This question will be answered by examining it in terms of the six criteria previously outlined.

1. Are members of the public assured of their participation in the hearing procedure?
2. Are they able to take part early enough in the planning process to debate first order issues?
3. Are they assured of impartiality of the hearing board?
4. Are they provided with sufficient notice before the hearing?
5. Are they provided with all the information necessary to formulate a well-prepared submission?
6. Are they able to receive funding, if necessary, to carry out research according to some pre-determined criteria?

B. THE RIGHT TO PARTICIPATE

Public participation has, until recently, been largely confined to input at the panel hearing and review stage. While all legislation sampled allows for participation in the formation of policy, in practice the public is rarely consulted in the issue formulation stage of decision-making (Lucas, 1976). As a result,

there is always a danger that critical decisions will be made and commitment to a project will be assured before the public participation process has begun.

These decisions may not be made within a conceptual framework of the entire project proposal. The fundamental problem is that decisions may be based on a series of incremental application approvals which are not necessarily subject to public knowledge or review. Department and agency rules generally require that permit or approval applications be carefully prepared, and issues be narrowed and framed as far as possible in technical terms rather than in value judgments. These departments or agencies may separately approve a number of minor applications according to their individual statutes which serve to support a single resource project. Financial backing may be given on the strength of these approvals. The cumulative result is that the resource proposal may be already complete, except for minor technical details, before the final application is made (Lucas, 1976). As a result, participation, if permitted, usually occurs after the application is made. By this time, the issues have already been formulated and the public is in a position of interpreting and questioning the fully supported conclusions and recommendations of the applicant.

These criticisms have been made of the National Energy Board and the Environmental Assessment and Review Process. Hearings before the National Energy Board often occur too late to assure the public of any influence in the final decisions (Franson, *et al.*, 1973). By the time hearings are called, a large amount of time and money may have already been spent on project design, and the decision-maker may be unwilling to consider any alternatives. Franson *et al.* (1973) suggests that hearings involving the public should be held at two stages in the decision-making process:

1. when amplified guidelines are issued;
2. when a certificate of public convenience and necessity is applied for (Franson *et al.*, 1973, p330).

In the case of Environmental Assessment and Review hearings, participation is only encouraged once the initial environmental evaluation of an application is complete and a review panel is established to assess the resulting environmental impact statement. If the public has demonstrated an interest in a particular project, the screening process should be opened to allow for public input. Rees (1982) suggests that to facilitate this involvement, participating departments and agencies should be required to document current screening procedures and to publish a periodic register of projects already screened and those scheduled for future review.

Emond (1978) suggests that the public should be actively involved in the preparation of guidelines for the environmental impact statement as well as the initial screening stage. By helping to prepare guidelines, the public would gain access to the background research material, the guidelines as well as the environmental impact statement itself. Involvement at all stages would help to ensure more meaningful participation at the public hearing stage when the impact statement is reviewed.

In September, 1980, the Federal Environmental Assessment and Review Office initiated a consultative process to identify relevant issues and to prepare guidelines for an environmental impact statement to assess the proposed Beaufort Sea hydrocarbon proposal. This measure was perhaps the first time that the public was invited to participate in the assessment of a proposal before a specific application was made, and allowed for first order policy issues to be discussed among the federal and territorial governments, industry representatives, native organizations and public interest groups. This effort is a positive step in improving the quality of public participation.

C. LIMITS OF JURISDICTIONAL AUTHORITY

In some cases, an Act will provide for a public hearing with a very narrow scope. For example, the *Northern Inland Waters Act* is essentially limited to water management, while many projects involve adjacent lands which are covered under the *Territorial Lands Act*.

The problem of narrowness of inquiry is particularly evident in the case of hearings on water crossing licence applications. These are specific to each structure and are generally concerned with direct effects on immediately adjacent land and water; and technical questions related to materials and waste control. It might be possible to deal with a number of similar licence applications at a single hearing, but the focus of concern would still be a series of crossing structures that constitute parts of the total pipeline undertaking. A general public hearing held under Section 15(1) would allow consideration of a total pipeline proposal; but again, this overview of environmental issues would be limited to the effects on water resources (Franson, *et al.*, 1973).

The limits to the jurisdictional authority of a review by the National Energy Board were pointed out by Thompson (1978) who observed that the Board considered aspects of operating a marine terminal beyond the construction of a new pipeline were not within its jurisdiction. This limitation means that while the Board may review the territorial aspects of a pipeline proposal, it may not be responsible for or capable of examining the broad marine, environ-

mental and social issues related to the development of a port facility and the transportation aspects of a proposal (Wigmore, 1981). While the Board may inquire into the broader issues as they relate to the public interest (Section 20[3]), Thompson suggests that "neither the tradition and expertise, nor the legislative mandate of the Board lends itself to . . . complex socio-economic and environmental assessment" (Thompson, 1978, p94).

The National Energy Board has a specific mandate to consider economic and technical matters in a review of pipeline construction and operation and is thereby mainly concerned with the orderly and efficient development, transportation and marketing of energy resources. Hearings held under the National Energy Board are usually limited to the issuing of an export licence or certificate of public necessity and convenience. While it may consider other aspects of the public interest, there is no specific mention, for example, of consideration of environmental effects, and its past interpretation of its mandate suggests that its inquiries will not include the broader issues and implications of a pipeline proposal.

Even the Environmental Assessment and Review Process has in the past had limits to the kinds of questions it can address in its public hearings. EARP has been designed to examine site specific environmental impacts of proposed development. The hearing panel for the Lancaster Sound Offshore Drilling Project recognized that broader issues beyond environmental acceptability, including socio-economic considerations, should be addressed in determining the best use of the Sound, but stated that its mandate could not include these issues (Government of Canada, 1979). This may change as the EARP process broadens its scope of inquiry. Recently, the Department of Indian Affairs and Northern Development took measures to include these issues in subsequent hearings by giving EARP appropriate mandate to include socio-economic issues in hearings for the Arctic Pilot Project. Its mandate for the Beaufort Sea hearings has been broadened to incorporate social issues as well.

Issues which may be raised during an inquiry under the *Territorial Lands Act* can be fundamental and far-reaching in scope. This Act, however, has no authority to assess the impact of a marine transportation proposal. An inquiry encompassing both terrestrial and marine aspects could only be established under the *Inquiries Act*, an Act which is subject to the discretionary powers which were previously outlined.

D. JURISDICTIONAL OVERLAP

While no single agency has the authority to assess all aspects of a particular resource proposal, the jurisdiction of a number of Acts do overlap. If these

Acts are used in conjunction with one another, the result may be duplication of cost and effort. As an example, it is helpful to look at how they may be applied to a particular transportation project. The Arctic Pilot Project is designed to transport liquefied natural gas by ice-breaking tanker from Bridport Inlet on Melville Island to markets in southern Canada, the United States and possibly overseas. So far, two hearings have been initiated; one with respect to a gas export licence from the National Energy Board, and the other, an environmental impact review under the Environmental Assessment and Review Process.

These are the hearings which have been established. In addition, however, it is possible that public hearings will be held under the *Northern Inland Waters Act* if the pipeline component on Melville Island crosses any waterways. Other statutes confer discretionary powers upon Ministers or Cabinet to establish additional inquiry processes. For example, the Minister of Energy, Mines and Resources could authorize the National Energy Board to hold an inquiry into the energy policy considerations surrounding Arctic Liquefied Natural Gas proposals (*National Energy Board Act*, Sections 22-24). Similarly, the Cabinet could, either under the *Inquiries Act* or the *Territorial Lands Act*, establish an independent Commission of Inquiry to inquire into any specific or general issues surrounding the project.

All the above review agents have the powers to inquire into technical standards and environmental impacts. In addition, both the National Energy Board and the Environmental Assessment and Review Panel can carry out assessments of socio-economic impacts. While it is highly improbable that the Canadian government would authorize all of these hearing procedures for a single project, it *has* allowed substantial duplication of effort in the assessment of pipeline proposals in the western Arctic.

Six separate large-scale hearings were conducted to assess the Mackenzie Valley and Yukon pipeline proposals. One regulatory hearing under the National Energy Board was held and five advisory hearings including the Mackenzie Valley Pipeline Inquiry (under the *Territorial Lands Act*), the Alaska Highway Pipeline Inquiry, the Federal Environmental Assessment and Review Office (FEARO) interim and routing alternatives hearings and the joint Northern Pipeline Agency — FEARO Alaska gas pipeline hearing. The mandates of these hearings allowed for substantial overlap in subject matter, especially in the area of socio-economic and environmental concerns, resulting in a growing feeling of apathy among all who participated (Waddell, 1981).

The costs to participate effectively in each are borne heavily by both advocates and opponents of resource development projects. Emond suggests that "the costs of the same issues being heard over and over again before three or four overlapping boards probably weigh more heavily on the under-

financed, understaffed public interest groups, although ultimately society bears the burden of a senseless duplication of effort" (Emond, 1978, p282).

While it may be necessary to provide a small degree of overlap among the different hearing panels to ensure that all issues are raised, there is a need to clarify exactly what issues will be addressed by each agency and to establish a consistent pattern for assessing each type of concern. For example, it may be valuable to establish one agency which will deal with socio-economic concerns so that intervenors for socio-economics only have to deal with one government body over the course of an assessment.

Chapter 6

CONCLUDING OBSERVATIONS

6 CONCLUDING OBSERVATIONS

A. VALUE OF PUBLIC HEARINGS

Examination of the legislation pertaining to northern gas transportation projects show that public hearings, both regulatory and advisory, constitute an important aspect of consultation between government agencies and the public. The hearing process was analyzed generally in terms of its advantages and disadvantages as a participatory mechanism; as well as specifically by determining its effectiveness as a mechanism to consolidate public input on northern transportation projects.

In spite of their shortcomings, provisions for public hearings ought to be encouraged. Morley suggests that the process can be valuable for the following reasons:

Such a process has both information feed-out and information feed-back consequences. Those who ultimately make the decisions will have before them a greater range of facts and identified interests than they would otherwise consider. Undoubtedly, the making of a particular decision would become a more difficult task. However, once made, if honestly made, the decision would be guaranteed greater public support since, in the model being discussed, the public is to be involved in reaching that decision (Morley, 1976).

Most of the difficulties encountered by the public with the hearing process concern formal hearing processes which are costly, time-consuming, technical and narrow in scope and often discriminatory against the many interests who have neither the right to stand before a hearing board, nor the time or money to participate. The hearing process which encourages broad and informed public interest must be more flexible than the traditional, formal procedure. Thompson recognizes that the following components must be included in a public review process:

The ingredients of the procedure must include liberal definition of those citizens who can show a substantive environmental interest, full disclosure of all relevant data, government co-operation

and assistance in carrying out necessary investigations and tests, the opportunity to present the case at the appropriate decision making level and in the appropriate time and sequence, the opportunity to see and, if desired, rebut proposing arguments, and the means of knowing what decision has been made. Such procedural requirements can be further elaborated, and are subject to the caveat that pragmatism and flexibility in the administrative process require that they be tailored to fit each decision making role (Thompson, 1972).

These observations indicate that the public hearing has potential for effective participation. While past experience has not been altogether adequate, problems have arisen largely because of how the hearing procedure was applied, rather than with its structure *per se*. Its application in assessing resource development proposals is still evolving, and experience suggests that positive changes, though cautious, are being made to ensure its usefulness in consolidating public opinion on these issues. Concluding remarks highlight continuing issues which must be addressed if the public hearing is to remain a viable mechanism for eliciting effective participation.

B. PRIORITIES TO BE ADDRESSED

Four priorities must be recognized by government, industry and the public who are involved in resolving resource use issues. These priorities are:

1. mandatory legislation be passed to ensure that all members of the public are given the opportunity to participate in hearings which address resource development proposals before final approval is granted;
2. an appropriate method of defining departmental jurisdiction be implemented to avoid fracturing or overlapping of responsibilities. To establish a consistent method of addressing specific inquiries to avoid unnecessary costs of time and money due to duplication of assessment;
3. public hearings be planned in conjunction with complementary techniques of educating the public and obtaining its views on resource development proposals;

4. mechanisms be established to provide for the following criteria:
 - a) adequate notice of the hearing and its procedures well in advance of the hearing date;
 - b) a hearing board or commissioner who is unbiased or representative of all interests being presented;
 - c) access to information and funding, as required, for participants.

Each of these considerations will be discussed separately.

There are still few legislative guarantees for public involvement in the public hearings. The right to participate remains at the discretion of the decision-making agency or official. Even agencies such as the National Energy Board and the territorial water boards which appear to guarantee public access to proceedings have statutory powers which disclose discretion to limit or exclude participation. The opportunity to participate must be provided if a full hearing of public interests and concerns are to be realized.

Furthermore, there is no legislative requirement whatsoever that the public be involved in the formation of policy and the development of policy guidelines relevant to northern resource development projects. Involvement of citizens could be provided at a preliminary stage if the government were committed to do so. The recent Beaufort Sea production hearings are an example of hearings being used as an anticipatory planning tool rather than a reactive mechanism in response to a specific industry application to government. These types of hearings should be required to develop broad policy guidelines within which specific resource development proposals can be assessed.

The second priority, to define departmental jurisdiction, will serve all participants — government, industry and the public — better when making submissions for review of proposals. The DIAND, FEARO and NEB all deal with northern hydrocarbon transportation problems and each has been given, at one time or another, the authority to investigate social, environmental, economic and technical issues. The functional overlap among these agencies is costly, not only to government but to industry and the public as well. It is difficult for the public to determine which body is responsible for specific issues. For example, where should questions of social impact be raised? At EARP hearings? At NEB hearings? With DIAND directly? Until this confusing jurisdictional situation is settled, interested citizens, as well as industry representatives and government officials will be forced to undertake a number of repetitious, expensive and time-consuming procedures. In the case of public groups

or interested citizens, limited resources may force them to choose where they can most effectively place their energies.

While this paper was not intended to provide a detailed study of other participatory techniques, it is recognized that appropriate alternative mechanisms can enhance the effectiveness of the public hearing. New strategies are being introduced in northern development assessments which may have a positive effect on the hearing procedure which is already established. The Green Paper on Lancaster Sound (Canada. Indian Affairs and Northern Development, 1982) provided two-way communication between government and the public, while the consultative approach using workshops and seminars in the assessment of the Beaufort Sea hydrocarbon production enhanced public input on these issues. If these measures are taken before hearings are held, it is likely that the quality of public submissions at the hearings will improve due to a better-informed public. The hearing process can then serve an appropriate feedback function on issues of public concern.

Finally, procedures guiding public hearings must provide for at least three criteria if they are to be full and fair to all participants. Notice, well in advance of the hearing date, should be publicized widely in terms that are easy to understand in both northern and southern communities which will be affected by a transportation proposal, as well as in major southern centres. Notice should include the procedural requirements for the hearings as well as provisions for dissemination of information about the project proposal. Without adequate and timely notification, members of the public are placed in a reactionary position and cannot take full advantage of the opportunity to participate.

Participants must also be guaranteed that the hearing body is not biased toward any particular interest. In the case of hearing panels, memberships will have to include experts who can deal with all concerns which may be raised. There has been a growing tendency to engage non-government experts to perform on northern panels, including membership by native residents. Native residents have participated on panels for the Alaska Highway Pipeline Inquiry, Norman Wells Project hearings and the Beaufort Sea production panel. Members drawn from a variety of interests help to ensure that the panel does not favour one group or individual over another and serves to maintain credibility of the hearing process.

Access to information and funding of legitimate interest groups are critical for a successful hearing. Information should be supplied in sufficient time and in an appropriate form to the intended recipients. The information requirement should not only grant the public access to studies and relevant documents, but also include access to government officials and technical experts,

who can provide information not only on technical aspects of a proposal but on the most effective means of identifying and communicating its concerns as well.

Finally, provisions for public funding have been characteristic of northern public inquiry procedures and have been introduced in agency hearings. However, there is no legislative provision which necessitates public funding. This situation raises an important issue. In many cases, members of the public have the experience and concern to provide valuable input to the hearings but do not possess the financial resources to prepare adequate submissions and participate in a meaningful way. Funding of these groups is justified, especially when the proponent has spent thousands or millions of dollars on preparation of its submission. To be fair and cost-effective, precise funding criteria should be developed and mechanisms established, outside of the hearings themselves, to ensure that funds are provided in a timely manner and that expenditures are fully justified.

C. FINAL REMARKS

Public hearings and the statutes which provide for them possess many deficiencies. Yet experience has shown that as sound management of natural resources has become a matter of public concern, government has made an attempt to incorporate public opinion into its planning procedures. Northern Canada, in particular, has experienced many public hearings over issues of large-scale resource development. As public interest groups have become more vocal in these issues, new arrangements have been made to incorporate more full and fair procedures during public hearings. In addition, alternative mechanisms have been tried to generate public response. These initiatives present a challenge to the members of the public that demand greater involvement in resource decision-making. This challenge is to guarantee public rights in the decision-making process and to exercise these rights in planning and management of natural resources.

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GLOSSARY OF TERMS

Department of Indian Affairs and Northern Development	DIAND
Environmental Assessment and Review Process	EARP
Environmental Impact Statement	EIS
Federal Environmental Assessment Review Office	FEARO
Mackenzie Valley Pipeline Inquiry	Berger Inquiry
National Energy Board	NEB

PERSONAL COMMUNICATIONS

Cornford, A.B., August 1983 (Chief, Ocean Information, IOS)
McKay, S., August 1983 (Esso Resources Canada Ltd.)
Arnette, M., August 1983 (Esso Resources Canada Ltd.)
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